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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 84-1454

MISSISSIPPI POWER & LIGHT COMPANY

Appellant

vs.

LOUIS A. CONERLY, ET AL

Appellees

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I.

THE FEDERAL QUESTIONS WERE TIMELY RAISED

Appellees state that the Appellant failed to timely raise the federal questions in this case and that, therefore, this Court should refuse to invoke its jurisdiction. It is clear that this argument is without merit.

This Court consistently has recognized that a constitutional issue may be raised for the first time in the petition for rehearing when the state court decision provides a new and unexpected basis for asserting the constitutional claim. Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932); Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 633 (1930); Missouri Ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930). Recent decisions of this Court demonstrate the continued validity of this principle. See Pruneyard Shopping

Center v. Robins, 447 U.S. 74, 87 (1980) (federal claims are "adequately presented even though not raised in lower state court, when the higher state court renders an unexpected interpretation of state law, citing Brinkerhoff and Gehner); Wilson v. Aiken Industries, Inc., 439 U.S. 877 (1978) (Blackman, J., concurring) (citing Great Northern); Bohannan v. Arizona, 398 U.S. 1, 4 (1967) (citing Brinkerhoff). As noted in the Appellant's Jurisdictional Statement (at p. 10), this principle has been applied when the state court decision gave a statute a new construction which, for the first time, brought it in conflict with the United States Constitution. See, Bohannan, 398 U.S. at 4; Herndon v. Georgia, 295 U.S. 441, 442 (1935).

It is undisputed that the present case comes within this rule. In dismissing the condemnation petitions, the lower court plainly based its decision on the Mississippi Public Service Commission's

lack of jurisdiction over the proposed interstate transmission line. In Appellees' brief in support of their Motion To Dismiss Or Affirm, the Appellees concede this, correctly pointing out that

> The trial court found and determined that the 51 mile length of 500 KV line was a part of an interstate line and that it will serve no Mississippi customer of Mississippi Power & Light Company; the construction of the line leading to New Orleans, Louisiana, is solely for interstate business and the sales are in interstate commerce. The Court concluded that the Mississippi Public Service Commission had exceeded its statutory authority and jurisdiction in awarding a certificate of public convenience to construct the link of transmission line, and that the four eminent domain cases should be dismissed. (Emphasis added). Appellees' Brief at 14.

It is clear that the lower court did not interpret, analyze, or any way base its decision on the provisions contained in Section 11-27-15.

Similarly, Appellees do not dispute that in its decision on October 10, 1984, the Mississippi Supreme Court for the first time interpreted the terms "public

use" and "public necessity" in Section 11-27-15 as "contemplat[ing] use by the citizens of this state." It is this interpretation of Section 11-27-15 that renders the statute unconstitutional by effectively prohibiting any utility from constructing a transmission line to transmit electricity out of state. It was also this decision by the state supreme court which, again, for the first time, interpreted § 11-27-15 as permitting plenary consideration of a Public Service Commission ruling in a collateral proceeding -- a review greater than that allowed by Section 77-3-67. It is clear that it was not until after this decision by the Mississippi Supreme Court that Appellant could attack Section 11-27-15 on federal constitutional grounds.

Appellees do not contest any of these points, all of which were discussed by the Appellant in its jurisdictional statement. The Appellees effectively concede that the

Appellant raised the constitutional issues at the first opportunity. The Appellees dispute only that an issue raised in the petition for rehearing can ever be considered timely. In support of their position, Appellees cite Cardinale v. Louisiana, 394 U.S. 437 (1969), and argue that Great Northern is inconsistent with the more recent Cardinale decision. In Cardinale, the petitioner raised a constitutional objection to a Louisiana statute for the first time in his appeal to the United States Supreme Court. Since the petitioner had failed to raise the constitutional issue "in any way below," this Court ruled that the federal question was not properly before it. 394 U.S. at 439.

In contrast, in Great Northern, as in the present case, the federal question was raised in the petition for rehearing to the state supreme court, before the appeal to the U.S. Supreme Court. This Court held that the issue was timely asserted

since it was raised at the first opportunity. It is clear that Cardinale and Great Northern are not inconsistent decisions. Moreover, as indicated above, recent decisions of this Court decided since Cardinale have recognized the continued validity of Great Northern and the principle applied in that case.

Appellees have never disputed the fact that prior to the Mississippi Supreme Court decision on October 10, 1984, Appellant could not have raised any constitutional objections to Section 11-27-15. On appeal, one cannot assume that a state appellate court will introduce new and unconstitutional interpretations of state law. The Appellees also admit that Appellant raised the constitutional questions in its petition for rehearing. See Appellees Brief at 2, 15-16. Since the Appellant raised the federal questions at the first opportunity, these issues are properly before the Court.

II.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The Appellees also claim that the present case does not involve any substantial Federal questions. However, the basis for this contention, if any, is unclear. Appellees make no effort to respond to Appellant's claim that Section 11-27-15 is unconstitutional because it places an impermissible burden on interstate commerce. Similarly, Appellees make limit effort to address the due process claim discussed in Appellant's Jurisdictional Statement. Instead, Appellees emphasize that the Mississippi Supreme Court correctly analyzed and interpreted the state statutes. Consequently, Appellees conclude, since the eminent domain statutes involve questions of state law, this case cannot involve any Federal questions.

This argument illustrates Appellees' misunderstanding of or concession to Appellant's arguments on this appeal. The question before the Court is not whether the Mississippi Supreme Court correctly applied and interpreted the state eminent domain statutes. As the state court of last resort, the Supreme Court of Mississippi's statutory interpretations necessarily are the "correct" ones, or at least the only ones that matter. The question that is before the Court is whether the statutes themselves, as interpreted by the state Supreme Court, are in conflict with the United States Constitution. The fact that the statutes in this case involve an area of state concern does not, as Appellees attempt to suggest, remove it from the constitutional scrutiny of this Court. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Milliken v. Bradley, 418 U.S. 717, 744 (1974). It is a basic principle of constitutional law

that any state provision in conflict with the United States Constitution is invalid. U.S. Const. Art. VI. Cl. 2. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This fundamental rule applies equally to eminent domain statutes. See West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

The Appellee's reliance on Jackson Redevelopment Authority v. King, Inc., 364 So.2d 1104 (1978) is also misplaced. The fact that the Mississippi Supreme Court has ruled that the state's eminent domain statutes do not violate the equal protection clause of the Constitution is neither binding on this Court or relevant to the issues presented on this appeal. See Huffman v. Pursue, Ltd., 420 U.S. 592, 605 (1975).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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